SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 709.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

CHRIS ELIOFF STAFAFF, ALIAS CHRIS ELIOFF.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Caption	a	1
Citation and service	1	1
Writ of error and return	2	2
Indictment	4	3
Demurrer	7	5
Order sustaining demurrer	8	5
Memorandum opinion	9	5
Petition for writ of error	15	8
Assignment of errors	16	9
Order allowing writ of error	17	10
Election as to record	18	10
Order enlarging time	19	10
Clerk's certificate	20	11

a In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

THE UNITED STATES, PLAINTIFF,
vs.
CHRIS ELIOFF STAFOF, ALIAS CHRIS ELIOFF and Steve Nick, defendants. } No. 7400.

TRANSCRIPT OF THE RECORD ON WRIT OF ERROR TO THE UNITED STATES SUPREME COURT.

1 THE UNITED STATES OF AMERICA:

To Chris Elioff Stafoff, alias Chris Elioff, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Charles B. Faris, judge of the District Courts of the United States within and for the Eastern District of Missouri, this 22d day of December in the year of our Lord one thousand nine hundred and twenty.

C. B. FARIS,
United States District Judge,
for the Eastern District of Missouri.

We, the undersigned attorneys of record for defendant Chris Elioff Stafoff, alias Chris Elioff, do hereby waive the issuance and service upon Chris Elioff Stafoff, alias Chris Elioff, or upon us as his attorneys, of citation on appeal, and accept service of the same and enter appearance of defendant herein.

Witness our hand this the 22nd day of December, A. D. 1920.

BASS & BASS AND J. H. MACKLER,
Attorneys for Defendant.

(Endorsed:) No. 7400. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. United States of America, plaintiff in error vs. Chris Elioff Stafoff, alias Chris Elioff, defendant in error. Citation. Filed Dec. 22, 1920. W. W. Nall, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the September term, 1920, thereof, between United States of America, plaintiff, and Chris Elioff Stafoff, alias Chris Elioff, defendant, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, and filed in the office of the clerk of the Supreme Court of the United States, on or before the 21st day of January, 1921, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 22nd day of December, in the year of our Lord one thousand nine hundred and twenty.

Issued at office in the city of St. Louis, with the seal of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, dated as aforesaid.

[SEAL.] W. W. NALL,
Clerk District Court United States, Eastern Division of the Eastern Judicial District of Missouri.
By IRWIN MITCHELL,
Deputy.

RETURN TO WRIT.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said District Court, at office in the city of St. Louis, Mo., this 24th day of January A. D. 1921.

W. W. NALL,
Clerk of said Court.

[SEAL.]

(Indorsed:) Filed Dec. 22, 1920. W. W. Nall, Clerk.

3 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri.

Be it remembered, that heretofore, to wit, on the 22d day of December, A. D. 1920, there was filed in the office of the clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, an election to take typewritten transcript and præcipe therefor, in cause numbered 7400 of causes in said court, wherein The United States is plaintiff, and Chris Elioff Stafof, alias Chris Elioff, and Steve Nick are defendants, which said election to take typewritten transcript and praecipe therefor, and the pleadings and proceedings called for therein are in words and figures as follows, to wit:

4 INDICTMENT.

In the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, at the March term thereof, A. D. 1920.

The grand jurors for the United States of America, duly empaneled, sworn, and charged in and for the District Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri, at the March term thereof, A. D. 1920, and inquiring in and for said division of said district, upon their oaths present and charge:

That on or about the 31st day of March, A. D. 1920, at number 507 St. Anthony Street, in the city of Saint Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the first internal revenue district of Missouri, and within the jurisdiction of the court aforesaid, Chris Elioff Stafoff, alias Chris Elioff, and Steve Nick unlawfully and feloniously did have in their possession a certain still set up, without having registered the same with the collector of internal revenue of the first internal revenue district aforesaid, by subscribing and filing with said internal revenue collector duplicate statements in writing, setting forth the particular place where such still was set up, the kind of still and its cubic contents, the owner or owners of said still and his or their place of residence, and the purpose for which said still had been and was intended to be used, and which said still then and there consisted of a galvanized milk can, commonly called

a still, and having a capacity of about ten gallons, a copper tube, used in place of a coil, which is commonly called a worm, attached to a wooden keg of the capacity of about ten gallons, used as a cooler or condenser, together with all necessary attachments and
5 adjuncts, such as a heating apparatus and rubber hose, necessary for the operation of said still, and which said still was then and there capable of and was intended for the production of distilled spirits for beverage and commercial purposes.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second count.

The grand jurors aforesaid, upon their oaths aforesaid, do further present and charge:

That on or about the 31st day of March, A. D. 1920, in and on certain premises other than a distillery duly authorized according to law, to wit, the premises known as number 507 St. Anthony Street, in the city of Saint Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the first internal revenue district of Missouri, and within the jurisdiction of the court aforesaid, Chris Elioff Stafoff, alias Chris Elioff and Steve Nick did unlawfully and feloniously make a certain mash consisting of about eighty-five gallons of raisins and water, and which said mash was then and there fit for the distillation and production of distilled spirits, to wit, whiskey.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Third count.

The grand jurors aforesaid, upon their oaths aforesaid, do further present and charge:

That on or about the 31st day of March, A. D. 1920, at No. 507 St. Anthony Street, in the city of Saint Louis, in the State of Missouri, within the eastern division of the eastern judicial district of Missouri, and within the first internal revenue district of Missouri, and within the jurisdiction of the court aforesaid, Chris Elioff Stafoff, alias Chris Elioff, and Steve Nick, did unlawfully and wil-
6 fully manufacture a certain quantity of distilled spirits, to wit, one gallon, more or less, of whiskey containing one-half of 1 per cent and more of alcohol by volume; they, the said Chris Elioff Stafoff, alias Chris Elioff, and Steve Nick, not then and there having first obtained a permit so to do, under the rules, regulations, and conditions prescribed by the Commissioner of Internal Revenue.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Signed) JAMES E. CARROLL,
United States Attorney.

(Indorsed: "No. 7400. United States District Court, eastern division of the eastern judicial district of Missouri. The United States vs. Chris Elioff Stafof, alias Chris Elioff and Steve Nick. Indictment for Sec. 3258, R. S.; Sec. 3282, R. S., act of October 28, 1919, A true bill. (Signed) Oliver B. Barrows, foreman grand jury. Filed June 15, 1920. (Signed) W. W. Nall, clerk. (Signed) James E. Carroll, U. S. attorney.")

7 DEMURRER.

Comes now the defendant in the above-entitled cause, and demurs to the first and second counts of the indictment heretofore returned, and as reason therefor says:

First. That said first count in said indictment is bottomed upon section 3258 of the Revised Statutes of the United States, and said second count in said indictment is bottomed upon section 3283 of the Revised Statutes of the United States, which said sections were by the act of October 28, 1919, commonly called the Volstead Act, repealed.

Second. That said counts one and two in said indictment fail to charge defendant with any offense under the laws of the United States.

(Signed) J. H. MACKLER,
(Signed) BASS & BASS,
Attorneys for Defendant.

(Indorsed: "Filed Sept. 15, 1920. W. W. Nall, clerk.")

8 ORDER SUSTAINING DEMURRER.

The court having fully considered the demurrer of defendant to the first and second counts of the indictment herein, doth

Order, that said demurrer be, and the same is hereby, sustained. Opinion filed.

(October 18, 1920. C. B. Faris, judge.)

9 MEMORANDUM OF COURT ON DEMURRER TO INDICTMENT.

Defendants are being prosecuted on an indictment wherein the first count charges them with the violation of section 3258, R. S., and the second count thereof with the violation of section 3282, R. S. They demur to these counts for that as they contend, sections 3258 and 3282 were repealed by the provisions of the Volstead Act (act of October 28, 1919). Sections 3258 and 3282 supra, are contained among the provisions of the law relating to internal revenue, and they were obviously intended and designed originally as parts of the necessary machinery of that law, for the better enforcement of the collection of the revenue. Section 3258, supra, makes it a crime to set up a still without having theretofore registered such still with

the collector of internal revenue of the appropriate district; while section 3282, supra, forbids the making of a mash fit for the production of distilled spirits on any premises except those of an authorized distillery.

10 Section 35 of the Volstead Act provides that all existing statutory provisions which are not inconsistent with the provisions of the Volstead Act are not to be held as repealed thereby, but to be additions to such act. Conversely, it follows, that there is a repeal of all former existing laws when such former laws are inconsistent. This provision is only declaratory of the general law. A repeal by implication would occur, absent such statutory declaration, if the new law is inconsistent with the old on the same subject.

Holding that sections 3258 and 3279 and 3281, R. S., were repealed by the Volstead Act, Judge Smith in the case of the United States vs. Windham, 264 Fed. l. c., 377, said:

"The general rule for the construction of statutes is that, when a later statute is enacted, inconsistent with a preceding statute and covering the entire ground of the subject matter, it supersedes and impliedly repeals the preceding statute. Especially is this the case when the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later statute, is presumed to supersede the earlier and heavier."

There can, of course, be no manner of doubt as to the correctness of the applicatory rule of law as stated by Judge Smith in the above excerpt. (U. S. vs. Tynen, 11 Wall., 88.) If, therefore, the provisions of the Volstead Act are inconsistent with the provisions of the older revenue laws, a repeal has occurred. In passing, I may observe that there is in Title III of the Volstead Act, which title deals with the manufacturing of alcohol, a similar provision (section 19,

11 Title III, act of October 28, 1919), providing for the repeal of all inconsistent laws. Besides, Title III, in section 9 thereof, expressly declares that section 3258, R. S., is not applicable to industrial alcohol plants.

The provisions of Title II of the Volstead Act as to the manufacture of distilled spirits designed for medicinal purposes are somewhat meagre. In order to lawfully manufacture such spirits a permit must be obtained from the Commissioner of Internal Revenue. (Sec. 6, Title II, act of October 28, 1919.) If such spirits shall be made without such permit, an offense is committed, which offense on conviction is punishable by the provisions of section 29 of Title II thereof. Section 3258, R. S., required the registration of a still, when set up, to be made with the collector of internal revenue of the appropriate district, as already stated. If a distiller of spirits for medicinal uses should under the provisions of the Volstead Act procure a permit to manufacture such liquors from the Commissioner of Internal Revenue, it may well be doubted whether he could be

successfully prosecuted under section 3258, R. S., for that he had not theretofore registered with the collector of internal revenue the still which the permit allowed him to use in such manufacture.

The theory of the old revenue laws made the manufacture of liquors lawful and recognized it as a lawful way of producing Government revenue. The Volstead Act no longer recognizes it as a producer of revenue, but outlaws both the making of and the traffic in liquor, except for stated and limited uses, for which uses, and pursuant only to a permit, it may now only be made at all.

12 Sections 3258 and 3282 were enacted as a part of the necessary machinery to safeguard the Government against the loss of revenue. Answering the question expressed in the doubt above set forth, I am clearly of the view that no registration with the collector of the appropriate district would afford any protection to the owner of the still against punishment, should liquor be made in such still, and should such distiller have no permit from the Commissioner of Internal Revenue to manufacture liquor. In general, I agree with much that is said on this and germane questions by Judge Smith in the Windham Case, supra (see also opinion of Pollock, J., in United States vs. Fortman, not yet reported); but I do not think it is necessary upon the point up for judgment to go so far as Judge Smith has gone in the discussion of this point. A test that is fair, and, I think, all-embracing upon the question of inconsistency, vel non may be applied in the case at bar by considering whether the acts charged against defendants under sections 3258 and 3282 are provided for and made punishable by the Volstead Act. If he may, under the Volstead Act, be punished (a) for setting up a still, and (b) for having in his possession mash, fit for the production of distilled spirits, then he may be punished under two laws for identically the same act. If such inconsistency exists it would, in my opinion, constitute an inconsistency meet for the application of the rule of repeal by implication, and one which falls precisely within the purview of the rule which I have quoted above.

13 Apposite to this question it will be noted that section 25 of Title II of the Volstead Act says:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in such liquor or property."

It follows that if there has been an actual manufacture of liquor, the defendants can be punished for the act under the first clause of section 29 of the Volstead Act. If they have not actually made distilled spirits, but simply had in their possession a still adapted and designed for the making of such spirits, absent a permit allowing them to make the same; or, if they had in their possession any mash so adapted and designed, in either case the still (whether set up or not set up) and the mash constitute property within the meaning of said section 25, and upon conviction the defendants may for either

offense be punished under the provisions of the second clause of section 29 of Title II of the Volstead Act.

It ought to be fairly obvious that no one should be liable for the same act to punishment under two sections of the criminal statutes. Neither ought it to be a greater crime, or a crime punishable by a more infamous or severe punishment, to intend to commit, or to make preparation for the commission of an offense, than it is to commit the offense itself. In other words, if a man manufacture liquor, either wine, beer, or whiskey, he is punishable for the first offense by a fine, or a jail sentence, or a fine and jail sentence; but (if the contention of the Government here be correct) if he has merely
14 set up a still or merely has mash in possession, he may be sentenced to the penitentiary for the first offense for a term as great as two years, regardless of whether he had actually made liquor. In no jurisdiction has an assault with intent to kill ever been regarded as more heinous, nor has it ever been more severely punished, than has willful murder itself. I can not bring myself to think that Congress had in mind so anomalous a situation. Rather, I am constrained to believe, Congress had in mind the very situation which has arisen here. That is, that inevitably there would be a largely increased number of violations of the law by the use of the necessary paraphernalia in the forbidden manufacture of liquor. And that Congress did not intend that (based upon the record of violations of this law, as compared with the total population) some one-tenth of one per cent of the inhabitants of the United States would, or could be, annually incarcerated in the penitentiary.

So far as I can see the Volstead Act covers and punishes not only the acts charged against the defendants here, but also every other act and situation which can possibly arise.

Without more I conclude that the demurrer to the counts which attempt to charge offenses under the provisions of sections 3258 and 3282, R. S., ought to be sustained. It is so ordered.

(Signed) FARIS, J.

(Indorsed:) Filed Oct. 18, 1920. W. W. Nall, clerk.

15 PETITION FOR WRIT OF ERROR.

Now on this the 22nd day of December, A. D. 1920, comes the above-named plaintiff, United States of America, by Vance J. Higgs, special assistant to the Attorney General of the United States of America, its attorney, and complains that in the record and proceedings had in said cause, and also in the rendition of the decision and judgment in the above-entitled cause in said United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, at the September term thereof, against said plaintiff, on the 18th day of October, A. D. 1920, manifest error occurred to the great damage of said plaintiff in the decision and judgment of said District Court of the United States, in sustaining the demurrer to the first and second counts of the indictment therein, which said

decision and judgment is based upon the invalidity of the statutes upon which counts one and two of said indictment are founded, to wit, sections 3258 and 3282 of the Revised Statutes of the United States.

Wherefore, this plaintiff, in accordance with the provision of the act of March 2, 1907 (section 1704, United States Compiled Statutes, 1916), prays for the allowance of a writ of error in said cause, and for such other orders and process as may cause the errors here complained of to be corrected, and the decision and judgment in said proceedings to be reversed by the Supreme Court of the United States of America.

(Signed) VANCE J. HIGGS,
Special Assistant to the Attorney General of the United States of America, Attorney for Plaintiff.

(Indorsed: "Filed Dec. 22, 1920. W. W. Nall, clerk.")

16

ASSIGNMENT OF ERRORS.

Now on this the 22nd day of December, A. D. 1920, comes the United States of America, plaintiff herein, by Vance J. Higgs, special assistant to the Attorney General of the United States of America, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. That the court erred to the injury of the United States of America in sustaining the demurrer filed by defendant to counts one and two of the indictment in this cause, on the ground that the act of October 28, 1919, had repealed sections 3258 and 3282 of the Revised Statutes of the United States, the first and second counts of the indictment in this cause being predicated upon a violation of said sections.

Second. That the court erred to the injury of the United States of America in construing that said act of October 28, 1919, repealed sections 3258 and 3282 of the Revised Statutes of the United States.

Third. That the court erred to the injury of the United States of America in sustaining and not overruling said demurrer to the indictment in this cause.

Fourth. That the court erred to the injury of the United States of America in deciding said demurrer to the indictment against the plaintiff and in favor of the defendant.

Wherefore the United States of America prays that said decision and judgment of said District Court of the United States for the Eastern Division of the Eastern District of Missouri may be reversed, annulled, and held for naught, and that the said United States of America may be restored to all things which it has lost, occasioned by said decision and judgment.

(Signed) VANCE J. HIGGS,
Special Assistant to the Attorney General of the United States of America, Attorney for Plaintiff.

(Indorsed:) Filed Dec. 22, 1920. W. W. Nall, clerk.

17 ORDER ALLOWING WRIT OF ERROR

Upon motion of Vance J. Higgs, special assistant to the Attorney General of the United States, attorney for plaintiff herein, and on filing its petition for an order allowing writ of error, together with an assignment of errors, it is

Ordered, that a writ of error be allowed to the Supreme Court of the United States of America from the decision and judgment, entered October 18, A. D. 1920, sustaining the demurrer filed by defendant herein to the first and second counts of the indictment in the above-entitled cause, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

This the 22nd day of December, A. D. 1920.

(Signed) C. B. FARIS,
Judge United States District Court,
Eastern District of Missouri.

(Indorsed:) Filed Dec. 22, 1920. W. W. Nall, clerk.

18 ELECTION TO TAKE TYPEWRITTEN TRANSCRIPT AND PRÆCIPE THEREFOR.

To the Honorable W. W. Nall, clerk of the United States District Court for the Eastern District of Missouri:

You are hereby notified that a writ of error having heretofore been allowed in this cause to the Supreme Court of the United States, the plaintiff herein, the United States of America, elects to take a typewritten, instead of a printed, transcript of all the proceedings had in this cause, same to include the indictment, the demurrer to the indictment, the petition for writ of error, the order allowing the writ of error, the writ of error together with your return thereon, as clerk of the United States District Court, the assignment of errors of the United States of America, and the citation together with the acceptance of service endorsed thereon by Bass & Bass and J. H. Mackler, attorneys for defendant, said Chris Elioff Stafoff, alias Chris Elioff, same to be certified to the clerk of the Supreme Court, and to be incorporated in the transcript to be printed under the supervision of said clerk of the Supreme Court of the United States.

This the 22nd day of December, A. D. 1920.

(Signed) VANCE J. HIGGS,
Special Assistant to the Attorney General of the United States of America, Attorney for Plaintiff.

(Indorsed: "Filed Dec. 22, 1920. W. W. Nall, clerk.")

19 ORDER ENLARGING TIME TO DOCKET.

On application of plaintiff, and for good cause shown, it is hereby ordered, nunc pro tunc as of January 21, 1921, that the time within

which plaintiff shall file a transcript of the record in the office of the clerk of the Supreme Court of the United States be, and the same is hereby, extended to and including January 31, 1921.

January 24, 1921.

(Signed) C. B. FARIS,
U. S. Dist. Judge who signed citation.

(Indorsed: "Filed Jan. 24, 1921. W. W. Nall, clerk.")

20 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri.

I, W. W. Nall, clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a true and complete copy of the record in cause numbered 7400 of causes in said court wherein the United States is plaintiff, and Chris Elioff Stafof, alias Chris Elioff, and Steve Nick are defendants (save and except as restricted by the election to take a typewritten transcript and præcipe therefore, heretofore set out), as fully as the same remains on file and of record in said cause in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in the eastern division of said district, this 24th day of January, A. D. 1921.

[SEAL.]

W. W. NALL,
Clerk of said Court.
By ADAM H. JONES,
Deputy Clerk.

(Indorsement on cover:) File No. 28066. E. Missouri D. C. U. S. Term No. 709. The United States of America, plaintiff in error, vs. Chris Elioff Stafoff, alias Chris Elioff. Filed January 29th, 1921. File No. 28066.

Office of the clerk Supreme Court U. S. Received Jan. 26, 1921.

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